No. 42

IN THE

Supreme Court of the United States

October Term, 1941

UNITED STATES OF AMERICA,
Petitioner,

v.

LOUIS H. PINK, Superintendent of Insurance of the State of New York, and as Liquidator of the Domesticated United States Branch of the First Russian Insurance Company, Established in 1827,
Respondent,

VICTOR YERMALOFF and others,
Defendants.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY

BRIEF FOR BRUSSENDORF, ET AL., AS AMICI CURIAE

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Statement.

This brief is filed on consent of the parties to this appeal by Brussendorf, Tillman and Kraut (R., 20-21), who are named as defendants in this action. Their claims against the First Russian Insurance Company have been finally adjudicated prior to the recognition of the Soviet Government by the United States (255 N. Y. 415). After recognition, these claims were again sustained on the merits by the New York Court of Appeals (274 N. Y. 595). The payment of these claims by the Superintendent is stayed pending the disposition of the Government's claim to all the American assets of said Company.

(Italics are ours, unless otherwise indicated.)

POINT I.

The Government cannot change on appeal to this Court the theory of its case in the State Courts and its basic contentions therein decided.

For the first time in this litigation, the Government asserts in its brief in this Court, as follows:

> "*The claim of the United States.* Although, as stated above, the complaint prays that all assets remaining in the hands of the respondent after the payment of domestic creditors be turned over to the United States, the only relief presently sought is that the United States be recognized as the successor to the title and interest of the First Russian Insurance Company" (at p. 9).

In its complaint the Government squarely asserted that it seeks

> "(4) That this Court adjudge and determine that *the plaintiff is the sole and exclusive owner* entitled to immediate possession of the entire surplus fund, and direct the Superintendent of Insurance to act for and to pay over to the plaintiff the entire surplus fund" (R., 36).

The Court of Appeals, in the opinion, said:

> "We are agreed that without again considering such questions *this court should, in determining title to assets* of First Russian Insurance Company, deposited in this State, apply in this case the same rules of law which the court applied in the earlier case in determining title to the assets of Moscow Fire Insurance Company deposited here" (R., 71-72).

The Government must stand or fall upon the issue

whether or not it is entitled to all the assets of the First Russian Insurance Company at the present time (*Hull* v. *Burr*, 234 U. S. 712; *Ehman* v. *Gothenburg*, 200 Fed. 564; *Brockenbrough* v. *Champion Fibre Co.*, 176 Fed. 840; *Mesa Market Co.* v. *Crosby*, 174 Fed. 96; *McSherry Manufacturing Co.* v. *Dowagiac Manufacturing Co.*, 163 Fed. 34).

The attempted change of the Government's claim had been forced by the insistence of the Superintendent of Insurance, that even if the Government were entitled to the surplus American assets of the First Russian Insurance Company, its claim is premature, as at present there is no ascertainable surplus of these assets. The adjudicated claims of the creditors of the First Russian Insurance Company have not been paid. It may well be that after these payments, and the payment of administration expenses, there will be no surplus assets left of said Company in the hands of the Superintendent of Insurance.

It is because the Government found itself faced with this undisputable fact, that it brought its action before there is such ascertainable surplus, that it now attempts to argue that it must be allowed to watch the distribution of the American assets so as to protect its possible and tentative future interest.

In the first place, the claims of the creditors of the First Russian Insurance Company cannot be determined in the Government's action. These claims have been already adjudicated by the Court of final resort in New York (255 N. Y. 415; 274 N. Y. 595) in the State liquidation proceedings in rem to which the Government was not a party. The time to appeal from said decisions had long expired, and those claims became final and non-appealable judgments in rem against the First Russian Insurance Company and the New York Superintendent of Insurance, as State Liquidator of its American assets.

In interpreting its earliest decision with regard to the

claims of these creditors (255 N. Y. 415), made in 1931, the Court of Appeals said *In the Matter of Tillman*, 259 N. Y. 133, that their "* * *" right to recover had been established and the litigation was terminated except for computation by a referee of the amounts due * * *" (p. 135). After recognition, the Court of Appeals again sustained these judgments and held that full interest was payable thereon (274 N. Y. 595).

In the second place, no change in these decisions had been effected by the recognition of the Soviet Government by the United States in 1913.

In *Guaranty Trust Co.* v. *United States*, 304 U. S. 126, this Court unanimously said at pages 140-1:

> "The Government argues that recognition of the Soviet Government, an action which for many purposes validated here that government's previous acts within its own territory, see *Underhill* v. *Hernandez*, 168 U. S. 250; *Oetjen* v. *Central Leather Co.*, 246 U. S. 297; *Ricaud* v. *American Metal Co.*, 246 U. S. 304; *United States* v. *Belmont*, 301 U. S. 324; *Dougherty* v. *Equitable Life Assurance Co.*, 266 N. Y. 71, 84, 85; *Luther* v. *Sagor & Co.*, 3 K. B. 532, operates to set at naught all the legal consequences of the prior recognition by the United States of the Provisional Government and its representatives, as though such recognition had never been accorded. This is tantamount to saying that the judgments in suits maintained hereby the diplomatic representatives of the Provisional Government, valid when rendered, became invalid upon recognition of the Soviet Government. *The argument thus ignores the distinction between the effect of our recognition of a foreign government with respect to its acts within its own territory prior to recognition, and the effect upon previous transactions consummated here between its predecessor and our own nationals.* * * *

> "*We conclude that the recognition of the Soviet Government left unaffected those legal consequences* of the previous recognition of the Provisional Government and its representatives, which attached to action *taken here prior to the later recognition.*"

In *State of Russia* v. *National City Bank*, 69 Fed. (2nd) 44, the Court (C. C. A., 2nd) said at page 48:

> "Moreover, it is apparent that the intent was to assign all the claims of the Soviet Government to the United States, and *it is agreed to leave undisturbed diplomatically final non-appealable judgments and decrees of the American courts touching Russian affairs*, and non-judicial acts done in good faith by and with the officials of the previously recognized government of Russia."

And accord:

> *Lehigh Valley R. Co.* v. *State of Russia*, 21 Fed. (2nd) 396, 401, 402;
> *U. S.* v. *Trumbull* (D. C.), 48 Fed. 99, 104.

POINT II.

The State Courts decided this case, not on grounds of local public policy, but upon the state rights acquired by express contract between the State and the First Russian Insurance Company.

Careful perusal of the opinion of the Court of Appeals in the *Moscow Fire Insurance Co.* v. *Bank of New York & Trust Co.* (280 N. Y. 286) case shows that it placed its decision not on the basis of any local public policy, but upon the construction of the State statute permitting foreign insurance corporations to do business in the State of New York, holding that under that statute, a foreign

insurance corporation obtaining permission to operate a United States branch under the New York Insurance Law, thereby consents and expressly agrees that the laws of its domicile shall not be applicable to its American assets, until such time as the State of New York releases these assets for delivery to its foreign corporate domicile. The Court said at pages 307, 308, 309, 310, 312, 313 and 314:

> "We deal here with a class of property and a juristic person sui generis. Certainly no decree monopolizing the business of insurance in Russia; taking over the conduct of the insurance business formerly conducted in Russia by insurance corporations, and terminating the obligations of such companies could possibly have been intended to apply to business conducted here, or if so intended, could be binding here. *This State by its own laws determines what organizations shall be permitted to conduct the business of insurance here, what capital or security shall be required, and in other respects how such business shall be conducted. Certainly no foreign government may decree that it will take over the business here conducted by a corporation approved by this State, and cancel or change obligations to be performed here by such corporations.* * * *
>
> "It is the property which at all times has been within the State of New York. As the referee has found, it 'has always been held by and the legal title thereto vested in trustees resident in and citizens of the United States'. It has always been subject to the control of the Insurance Department and in a practical sense has always been in the custody of the State. At no time could the insurance company or the Russian government have transferred it to Russia. In strongest sense its situs was in this State, and the control of this State complete. * * *
>
> "The Insurance Law requires that before a foreign

insurance corporation is permitted to do business here there must be a definite separation and division of its property and even of its juristic personality. 'The Insurance Law, as now written, and as an entirety, indicates a purpose and policy in dealing with foreign insurance companies doing business in this country which are so definite and plain that they fix upon the words under consideration an interpretation which cannot fairly be avoided. We think that the Legislature in allowing these foreign companies to do business in this state and country intended to treat the domestic agency largely as a *complete and separate organization;* to place it on a parity with domestic corporations; to supervise and regulate it as such; and to require it by the deposit of prescribed assets to *set up within this country a capital corresponding to that of domestic corporations,* and which should be security for business transacted by it here and not elsewhere.' *Matter of People by Stoddard, Norske Lloyd Ins. Co.,* 242 N. Y. 148, 158, 151 N. E. 159, 162. (Italics are new.) *Thus the property of the United States Branch of a foreign insurance company acquired a character of its own. That character is 'dependent' upon the law of this State. The property from its nature is subject to the laws of this State, and both the property and the 'complete and separate organization' analogous to a domestic corporation are immune from the control of any foreign power.* No rule of comity and no act of the United States government constrains this State to abandon any part of its control or to share it with a foreign State. * * *

"Juridical concepts may be important factors in determining legal rights and obligations when concepts and obligation are parts of a consistent system of jurisprudence. The corporate 'fiction' of a single

artificial juristic person cannot be applied with unrelenting logic where one sovereign endows the corporation with life and another sovereign permits a branch of the corporation to do business only as a 'complete and separate organization.' * * *

"The property claimed here was in all respects subject to the law of this State. Though the courts of this State are bound to give effect to the decrees of the Soviet government in so far as these decrees terminated the existence of the company in Russia, they might still proceed with the liquidation of the property in their custody here, the creation of the Insurance Law, as a complete and separate organization, as such branches had always for many purposes been treated. As long as the parent company existed it would under the law of this State have certain residual rights in the property of the branch after the branch was liquidated. Those rights arose out of the relationship of parent corporation and branch. *The extinction of the parent company by the decrees of the Soviet government has eliminated the parent company and destroyed that relationship. A new situation has arisen which must be met in accordance with the law of this State.* The courts, giving effect as they must to the extinction of the parent company, must determine whether the parent company's residual right to property here passes by confiscatory decree to the sovereign who extinguished the parent corporation or whether under the law of this State such rights have passed to the stockholders and foreign creditors who, in answer to an invitation extended to them by this State, have come in and proven their claims in accordance with a procedure devised by this court to 'conform' to justice and equity' as those terms are understood here. *The courts below have made the proper choice, not be-*

cause enforcement of confiscatory decrees of property situated elsewhere is contrary to our public policy, but because under the law of this State such confiscatory decrees do not affect the property claimed here."[1]

The above statement of law is in accord with many merican authorities. See: *Beale, Treatise on the Conflict f Laws*, 1935, Vol. 1, pp. 320-321, 382-391; Vol. 2, pp. 777-84; *Lafayette Ins. Co.* v. *French*, 18 How. 404, 407, 408; *inney* v. *Nelson*, 183 U. S. 144, 150; *Thomas* v. *Mattiesen*, 32 U. S. 221, 234, 235.[2]

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[1] In his annual report to the New York legislature for 1915, the superintendent of Insurance said that: "* * * under our statutes, erefore, the United States branches transact business as quasi entities ther than as parts of their parent corporations" (N. Y. Ins. Report, art 1, Fire and Marine, 1915, p. 10).

In 1916 Cardozo, J., said in Comey v. United Surety Co., 217 N. Y. 268, pages 273-4:

"This defendant is a foreign corporation, but its franchise to act as a corporation does not empower it to transact the business of insurance in this state. It must subject itself to our laws, it must obtain the license of our government, or its business becomes illegal (Insurance Law, Sec. 9; L. 1909, ch. 33; Consol. Laws, ch. 28). * * * We think that a foreign corporation thus licensed under our own laws may not with reason be held to be absent from our state. It owes to the law of its creation its franchise to be a corporation, but it owes to the law of this state the privilege of doing business within our borders. In exercising that privilege it may be dealt with as if it were in truth a domestic corporation. This view of its position has support in recent decisions. In Morgan v. Mutual Benefit Life Ins. Co. (189 N. Y. 447, 454) we held that for many purposes a foreign insurance company, transacting business here, must be 'treated as a domestic insurance company and as domiciled in this state'."

[2] "A foreign corporation may, of course, do nothing which is contrary the law of the State in which it acts. If, therefore, a law of the ate forbids or regulates the acts of a foreign corporation, the law ust be obeyed." (Beale, Vol. 1, pp. 789, 780, citing inter alia Warner Co. v. Forshay Co., 57 Fed. [2nd] 656, cert. den. 286 U. S. 558; In re

In *Pinney* v. *Nelson*, supra, a conflict arose between the laws of corporate domicile of a Colorado corporation and the laws of California, where the corporation operated. This Court said at page 150:

> "Not content to rely upon the general authority which by the rules of comity the Colorado corporation would have to enter California, and transact business therein, they in terms set forth that a part of the purpose of incorporation was a transaction of business by the corporation in California. Now when they in terms specified that they were framing a corporation for the purpose of having that corporation do business in California, is it not clear that they were contracting with reference to the laws of that State? * * * *How can it be said that those laws do not enter into the contract and control as to all business done in pursuance of that contract within the limits of California?*"

It is a settled doctrine in this country that the power of the State over the acts of foreign corporations and their assets is much broader than that over domestic corporations. In *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28, this court said at page 43:

> "In other words, the State prescribes the purposes of a corporation and the means of executing those purposes. Purposes and means are within the State's control. This is true as to domestic corporations. *It has even a broader application to foreign corporations.*"

The extent of the State power over the operations and assets of foreign corporations doing business in its territory has been recently defined by this Court with regard to a conflict between the laws of the corporate domicile of a Connecticut corporation and those of Missouri, where the

corporation operated. In *Whitfield* v. *Aetna Life Insurance Co.*, 205 U. S. 489, this court said at page 495:

> "An insurance company is not bound to make a contract which is attended by the results indicated by the statute in question. If it does business at all in the State, it must do so subject to such valid regulations as the State may choose to adopt. Even if the statute in question could be fairly regarded by the court as inconsistent with public policy or sound morality, it cannot for that reason alone be disregarded; for, it is the province of the State, by its legislature, to adopt such a policy as it deems best, provided it does not, in doing so come into conflict with the Constitution of the State or the Constitution of the United States."

And see to the same effect:

Cable v. *U. S. Life Insurance Co.*, 191 U. S. 288, 307;

N. Y. Life Insurance Co. v. *Cravens*, 178 U. S. 389, 396, 401.

This Court also unanimously upheld the power of the New York Courts to continue the admisintration of the New York assets of the Russian insurance companies, even after the payment of the local creditors. It said in *U. S.* v. *Bank of New York & Trust Co.*, 296 U. S. 463 at page 476:

> "When the statutory trust was satisfied by the payment of domestic creditors and policyholders, it did not follow that the remaining assets were automatically released and the state court was ipso facto shorn of its jurisdiction, the court still had control of the property *and necessarily had the pertinent equitable jurisdiction to decide what should be done with it.* In such a case the court might

direct that the surplus assets should be remitted to a domiciliary receiver—if there were one—on appropriate conditions. *Matter of People (Norske Lloyd Insurance Co.)*, 242 N. Y. 148. *Or the Court might direct further liquidation, in order to provide for payment of other claims, if that course appealed to the sense of equity in the particular circumstances. Matter of People (Russian Reinsurance Co.)*, 255 N. Y. 415."

This is precisely what the government is now contending the State of New York and its Courts had no power or authority to do, but should be compelled to terminate the liquidation and hand over the assets of the First Russian Insurance Company to the United States Government as a successor of the parent company in Russia, now claimed lawfully represented by the Soviet Government.

In the recent case of *Russian & English Bank* v. *Baring Bros. Ltd.*, L. R. (1936), A. C. 405, the House of Lords was called to consider a conflict between a section of the British Companies Act enacted in 1929, providing for the liquidation of the assets of any foreign company located in Great Britain where such foreign company "has been dissolved or otherwise ceased to exist" under the laws of its corporate domicile. In sustaining the provisions of the English Act as controlling the disposition of the English assets of Russian & English Bank, a Russian corporation, as against the provisions of the Soviet liquidation decrees relating to the Russian banks, Lord Aitken said at page 409:

> "There is nothing abnormal in such a provision. The municipal law of this country, as of other countries, accepts the principle of international law that countries ordinarily accept the existence of juristic persons brought into being or recognized as existing in their country or origin. Similarly, they accept the destructon or cessation of such a juristic per-

sonality under the law of its country of origin. But if the municipal law choose, it may, in defined conditions, refuse to accept, or may accept only under conditions, either the creation or destruction of a foreign juristic person. Whether it has done so is for the Municipal Courts to decide, but if it has, then the Municipal Court must accept the situation. I see nothing incongruous in the Legislature saying, in effect: we accept the existence of a foreign corporation coming to trade in this country; we shall only impose a condition of registration. But if the corporation does trade here, acquires assets here, and incurs debts here, we shall not accept its dissolution abroad without a stipulation that if desirable, it may be wound up here so that its assets here shall be distributed among its creditors (I do not stay to consider whether its English creditors or creditors generally), and for the purpose of winding up it shall be deemed not to have been dissolved, for that event would defeat our municipal provisions for winding up a corporation. This does not seem to me to be recreating or reconstituting a new corporation. It is for particular and limited purposes refusing to recognize the dissolution of the old."

True, the House of Lords based the right to regulate the assets of foreign corporations within British territory upon the power reserved in the State's right to permit registration and operation of foreign corporations in its territory. It held that this power necessarily included the right to control the dispositon of the assets of the foreign corporation within the British territory, not only while it is operating there, but even after it ceased to exist or operate anywhere. As no laws of corporate domicile can effect or regulate the power of a foreign state to permit registration of foreign corporations in its territory, no power in a foreign

state over its corporations could regulate the final disposition of the assets of this foreign corporation in another state.

New York Court of Appeals preferred to place the power of the State to control the assets of foreign corporations, even after their dissolution at their corporate domiciles, upon the implied or expressed consent of these corporations when they enter the state to exempt their assets brought within the jurisdiction of the State of New York for the purpose of operating a United States branch from any effect of the laws of their corporate domicile and to subject them exclusively to the control and authority of the laws of New York. We prefer the reasoning of New York court to that of the House of Lords because it is based on voluntary submission and eliminates any possible discussion of the extent and limitations of the reserved State power relied upon by the House of Lords. If the foreign corporation expressly or impliedly consents when it comes to operate in the State of New York, that its assets within the State of New York should be exempted from the operation of its domestic laws and be subjected to the laws of the State of New York, its government cannot, thereafter, object to or question the application of the laws of New York to the New York assets of such foreign corporation.

The right of the State of New York to liquidate the assets of Russian insurance companies operating under its insurance law in accordance with its provisions and contrary to the provisions of the Soviet liquidation decrees seems indisputable in the light of the treatment afforded in other countries of the world to assets of Russian corporations doing business in foreign countries.

The British Government recognized the Soviet Government on February 1, 1924. Despite the recognition of Soviet law dissolving Russian corporations [*Lazard Bros.*

& Co. v. *Midland Bank, Ltd.*, L. R. (1933) A. C. 289; *In re Russian & English Bank*, L. R. (1932) 1 Chan. 663], the British Government enacted in 1929 an amended Companies Act (Part X, subd. 2, Sec. 338).[3]

Under the provisions of this Act, numerous branches of Russian corporations in England were liquidated by the British courts [*Russian & English Bank* v. *Baring Bros., Ltd.*, L. R. (1936) A. C. 405; *In re Russian Bank for Foreign Trade*, L. R. (1933) Chan. 745; *In re Tea Trading Co.*, L. R. (1933) Chan. 647; *In re Russo-Asiatic Bank*, L. R. (1934) 1 Chan. 720]. In *Baring Bros.* case, Lord Blanesburgh supplied the reason for the refusal of the British courts to recognize Soviet confiscation of corporate assets under the nationalization decrees, stating that "* * * it is ignored because any dissolution without a winding up previously completed and with creditors unpaid is an offense, an injustice, to these creditors if it be permitted to defeat their claims against the company" (p. 407).

France recognized the Soviet Government on October 26, 1924. Despite said recognition, the French courts assumed under Article 2 of the French bankruptcy law jurisdiction over the branches of Russian corporations operating in France, and proceeded to liquidate them for the benefit of

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[3] The section reads:

> "Where a company incorporated outside of Great Britain has been carrying on business in Great Britain, it may be wound up as an unregistered company under this part of the Act, notwithstanding that it has been dissolved or otherwise ceased to exist as a company under or by virtue of the laws of the country under which it was incorporated."

Similar laws were passed in Esthonia on October 27, 1920 (Zeitschrift fuer Ostrecht [1927], p. 1539), in Latvia on January 17, 1921, April 17, 1921 and September 16, 1927 (Zeitschrift fuer Ostrecht [1927], p. 56, and in Poland on March 22, 1928 (Zeitschrift fuer Ostrecht [1928], p. 1116.

creditors and stockholders and not in accordance with the Soviet confiscatory decrees. [*Re Russo-Asiatic Bank* (56 Clunet [1929], pp. 78, 1095); *Re Banque International de Commerce de Petrograd* (62 Clunet [1935], p. 125; *Re Banque Russe pour le Commerce Etranger* (62 Clunet [1935], p. 128); *Re Societe de Banque de Volga Kama* (62 Clunet [1935], p. 125); *Re Banque d'Azoff-Don* (62 Clunet [1935], p. 134)].

POINT III.

The State of New York has constitutional power to decline enforcement of transfer of title to the American assets herein involved as contrary to its public policy.

The title to the Government's claim here for the American assets of the First Russian Insurance Company, as set forth in its complaint [4] is based solely and exclusively upon

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[4] 8. In 1918 and thereabouts, the Russian Government, by its laws, decrees, enactments and orders including among others a decree dated April 18, 1918, regarding the registration of securities, a decree dated November 28, 1918, on the organization of the insurance business, a decree dated March 4, 1919, on the liquidation of state enterprises, and a decree of November 18, 1919, on the annulment of life insurance contracts, among others, proclaimed the business of insurance in all of its forms to be a monopoly of the Russian State; dissolved, terminated and liquidated all Russian insurance companies and organizations; nationalized all of the property and assets of every kind and wheresoever situated of all Russian insurance companies and organizations; discharged, cancelled, extinguished and annulled all of the debts and liabilities of all Russian insurance companies and organizations; discharged, cancelled, extinguished and annulled the shares in, and the rights of all shareholders in and to, all the property and assets of all Russian insurance companies and organizations, and discharged, cancelled, extinguished and annulled all of the obligations and liabilities of all insurance companies and organizations to all of their shareholders (R., 23-4).

the Soviet confiscatory decrees purporting to convey and assig by the operation of Soviet law all the assets of the First Russian Insurance Company to the Soviet Government (fols. 68, 70, 72, 92-4).

This Court unanimously construed the transaction involved in the Roosevelt-Litvinov agreement as merely transferring to the United States Government the rights of the Soviet Government. It said in *Guaranty Trust Co.* v. *U. S.*, 304 U. S. 126:

> "There is nothing in either document to suggest that the United States was to acquire or exert any greater rights than its transferor * * *."

The purported transfer of all the assets of the First Russian Insurance Company to the Soviet Government by operation of its laws, was a statutory assignment thereof in invitum of the owner. An assignment is a contract (*Fourth Street Bank* v. *Yardley*, 165 U. S. 634, 644-6, 650, 652-3; *Commercial Bank* v. *Rufe*, 92 Fed. 789, 795; *In re Hollins*, 215 Fed. 41, 43).

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10. As a result of said duly enacted laws, decrees, enactments and orders of the Russian Government, the said cash, securities and other assets of the insurance Company in the United States and in the State of New York became the property of the Russian Government and remained the property of the Russian State at all times up to November 16, 1933, as hereinafter set forth (R., 24).

19. On November 16, 1933, by an agreement as set forth in an exchange of diplomatic correspondence between the President of the United States and the Commissar for Foreign Affairs of the Union of Soviet Socialist Republics coincident with diplomatic recognition of the Soviet Government by the United States Government, a copy of which correspondence is annexed as Exhibit 1 to this complaint and made a part hereof as if set forth in full herein, the Union of Soviet Socialist Republics assigned to the plaintiff all amounts admitted to be due or that may be found to be due to the Union of Soviet Socialist Republics, including the entire said surplus assets involved in this action. Since November 16, 1933 the plaintiff has been and now is the sole and exclusive owner and entitled to immediate possession of the said surplus assets (R., 31-2).

In a decision rendered this year, this Court unanimously held that the States within the American Union have constitutional power to refuse enforcement of foreign contracts if contrary to their public policy.

In *Griffin* v. *McCoach*, 313 U. S. 498, this Court said at page 506:

> "If upon examination of the Texas law it appears that the courts of Texas would refuse enforcement of an insurance contract where the beneficiaries have no insurable interest on the ground of its interference with local law, such refusal would be, in our opinion, within the constitutional power of the Texas courts. Rights acquired by contract outside a state are enforced within a state, certainly where its own citizens are concerned, but that principle excepts claimed rights so contrary to the law of the forum as to subvert the forum's view of public policy. Cf. *Loucks* v. *Standard Oil Co.*, 224 N. Y. 99. It is 'rudimentary' that a state 'will not lend the aid of its courts to enforce a contract founded upon a foreign law where to do so would be repugnant to good morals, would lead to disturbance and disorganization of the local municipal law, or, in other words, violate the public policy of the state where the enforcement of the foreign contract is sought'. *Bond* v. *Hume*, 243 U. S. 15. Applying that reasoning this court affirmed the said court in following Texas' decisions which refused to enforce a valid foreign contract of guarantyship against a married woman. *Union Trust Co.* v. *Grosman*, 245 U. S. 412. Likewise state courts have been upheld in refusing to lend their aid to enforce valid foreign contracts which required the doing of prohibited acts within the state of the forum. *Bothwell* v. *Buckbee, Mears Co.*, 275 U. S. 274. Where this court has required the state of the forum to apply the foreign law

under the full faith and credit clause or under the Fourteenth Amendment, it has recognized that a state is not required to enforce a law obnoxious to its public policy. *Bradford Electric Co.* v. *Clapper*, 286 U. S. 145; *Hartford Indem. Co.* v. *Delta Co.*, 292 U. S. 143. The rule was not applied where the parties to the contract acquired rights beyond the state's borders with no relation to anything done or to be done within the borders. *Home Ins. Co.* v. *Dick*, 281 U. S. 397."

POINT IV.

In the absence of any violation of Federal constitution, this Court is bound by construction of New York statute made by the New York Court of Appeals.

Concededly, what is involved in this case is the correct interpretation of the New York Insurance Law (Sections 42, 515) relating to the conditions surrounding the permission by the State of New York to foreign corporations to operate within the State. The statute is not compulsive, inasmuch as no foreign insurance corporation is forced by the State of New York to enter the State and do business therein, if the terms of that statute are not acceptable to it. It is a purely voluntary act on the part of a foreign corporation to accept the conditions of the New York statute under which it is permitted to operate within that State. The First Russian Insurance Company is not a citizen of the United States, and is not entitled to the protection of those sections of the Federal Constitution that relate to privileges of our citizens.

It is not claimed that the New York Insurance Law in any way violated any treaties between the United States and Russia. A bold claim is advanced that the New York Court of Appeals, the highest Court of the State, erroneously construed the State statute.

Until this day, this Court consistently adhered to the

doctrine that it has no power to adopt another construction of the State statute, not affecting any Federal right, even if it believed that the construction made by the highest State Court is erroneous. This Court always recognized that it was bound by the construction placed upon the State statute by the State's highest Court (*State Tax Commission* v. *Van Cott*, 306 U. S. 511; *Senn* v. *Tile Layers Protective Union*, 301 U. S. 468; *Atchinson, T. & S. R. R. Co.* v. *Railroad Commission*, 283 U. S. 380; *Saltenstall* v. *Saltenstall*, 276 U. S. 260; *Supreme Lodge, etc.* v. *Meyer*, 265 U. S. 30; *American Ry. Express Co.* v. *Royster Guano Co.*, 273 U. S. 274; *State of Missouri* v. *North*, 271 U. S. 40; *Keith* v. *Johnson*, 271 U. S. 1).

Although the decision of the New York Court of Appeals in *Moscow Fire Insurance Co.* v. *Bank of New York & Trust Co.*, 280 N. Y. 286, has not changed (supra, footnote 1, at page 9) the interpretation of the New York Insurance Law as it was known in New York for almost a quarter of a century prior to that decision, this Court, recently interpreting its rulings in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, squarely held that the Federal Courts must apply the latest interpretation of the State statute made by the State Court, even if this interpretation represented a change in the opinion of the State Court, as compared with its prior decisions on the same statute.

In *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, this Court said at page 633:

> "But the Circuit Courts of Appeals do not have the same power to reconsider interpretations of State law by State courts as do the highest courts of the State in which a decision is rendered. The Mississippi Supreme Court had the power to reconsider and overrule its former interpretation, but the court below did not, and in the absence of a change by the Mississippi legislature, the court below could reconsider and depart from the ruling of the highest court of Mississippi on Mississippi's statute of lim-

itations only to the extent, if any, that examination of the later opinions of the Mississippi Supreme Court showed that it had changed its earlier interpretation of the effect of the Mississippi statute. *Wichita Royalty Co.* v. *City National Bank*, 306 U. S. 103, 107; Cf. *West* v. *American Telephone and Telegraph Co.*, 311 U. S. 223; *Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169."

POINT V.

There is no conflict between the Federal and State law, as under the unanimous construction of the Litvinov Agreement by this Court, the Government is merely a successor to the rights of the Soviet Government acquired under Soviet law.

The construction of the Litvinov agreement was made authoritatively by this unanimous Court in *Guaranty Trust Co.* v. *U. S.*, 304 U. S. 126, where this Court, in the opinion by the present Chief Justice, said at page 135:

> "The agreement and assignment are embodied in a letter of Mr. Litvinov, People's Commissar of Foreign Affairs of the Soviet Government, to the President and the President's letter of the same date in reply. * * *
>
> "There is nothing in either document to suggest that the United States was to acquire or exert any greater rights than its transferor or that the President by mere executive action purported or intended to alter or diminish the rights of the debtor with respect to any assigned claims or that the United States, as assignee, is to do more than the Soviet Government could have done after diplomatic recognition—that is, collect the claims in conformity to local law. Even the language of a treaty wherever reasonably possible will be construed so as not to

override state laws or to impair rights arising under them. *United States* v. *Arredondo*, 6 Pet. 691, 748; *Haver* v. *Yaker*, 9 Wall. 42, 44; *Dooley* v. *United States*, 182 U. S. 223, 230; *Nielson* v. *Johnson*, 279 U. S. 47, 52; *Todok* v. *Union State Bank*, 281 U. S. 448, 454."

See also *United States* v. *Bank of New York & Trust Co.*, 10 Fed. Supp. 269, 271-2.

No argument may change the plain language of the Roosevelt-Litvinov agreement. Merely because it confers upon the United States Government by an assignment the enforcement of rights allegedly existing in the Soviet Government, no new right was created in the United States Government. The agreement merely served as a conduit of rights derived by the Soviet Government either from its acts or some law. Such reflected right is not a federal right or privilege. (*Puerto Rico* v. *Russell & Co.*, 288 U. S. 476, 483; *U. S.* v. *Weld*, 127 U. S. 51, 57.)

Nor would the contention that the Government's alleged title to the American assets of the First Russian Insurance Company is based on the treaty as a federal law, aid it.

The Roosevelt-Litvinov agreement commands no higher power than a congressional statute (*Rainey* v. *U. S.* 232 U. S. 310, 316; *U. S.* v. *Lee Yen Tai*, 185 U. S. 213, 220-1; *Horner* v. *U. S.*, 143 U. S. 570, 578; *Whitney* v. *Robertson*, 124 U. S. 190, 194). Neither the treaty nor a Federal statute can authorize that which the Federal Constitution forbids (*Asakura* v. *Seattle*, 265 U. S. 332, 341; *Thomas* v. *Jay*, 166 U. S. 264, 271; *Geofroy* v. *Riggs*, 133 U. S. 258, 267; *The Cherokee Tobacco*, 11 Wall. 616, 620-1; *Doe* v. *Braden*, 16 How. 635, 657).

The Federal Constitution (the Fifth Amendment) does not permit the Federal Government to take private property within the United States without compensation under color of any Federal right.

Alien property within the United States, equally with the property of citizens, is within the prohibitions of the Federal Constitution (*Truax* v. *Rajch*, 239 U. S. 233, 239; *U. S.* v. *Wong Kim Ark*, 169 U. S. 649, 695; *Wong Wing* v. *U. S.*, 163 U. S. 228, 242; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369). The prohibition of the Fifth Amendment to the Federal Constitution binds the Government with regard to the property of aliens in the United States (*Russian Volunteer Fleet* v. *U. S.*, 282 U. S. 481, 491, 492).

In *Guaranty Trust Co.* v. *U. S.*, supra, this Court said at page 134:

> "* * * We can find nothing in the agreement and assignment of November 16, 1933 which purports to enlarge the assigned rights in the hands of the United States * * *."

In *U. S.* v. *Manhattan Co.*, 276 N. Y. 396, the Court, also construing the Roosevelt-Litvinov Agreement, said at pages 406 and 407:

> "The plaintiff here, as assignee of the Soviet government, holds no greater title and stands in no better position than its assignor."

The position of the Soviet Government and its assignee, the United States Government, in enforcing the claims of the Soviet Government, in our courts is merely that of an ordinary private litigant (*Guaranty Trust Co.* v. *U. S.*, 304 U. S. 126, 135; *U. S.* v. *Belmont*, 85 Fed. (2nd) 542, 544; *U. S.* v. *National City Bank*, 83 Fed. (2nd) 236, 238; *Ritter* v. *U. S.*, 28 Fed. (2nd) 265, 267).

No treaty or statute of the United States ever conferred any title on the Soviet Government. Whatever rights that Government could have claimed in our courts, were derived from Soviet legislation and the decisions of the Soviet courts. Either the Government claims under this Soviet title assigned to it by the Roosevelt-Litvinov Agreement, or it has no claim at all.

No doctrine of uberrima fides in the interpretation of the treaty imposes a duty upon the court of writing into the treaty provisions which it does not contain. The only legal systems that might have governed the rights of the Soviet Government before the Roosevelt-Litvinov Agreement, was either that of the Soviet Government itself or some other state wherein the property in question was located. In this particular instance, all the assets of the First Russian Insurance Company at all the times, and even now, are still within the State of New York.

POINT VI.

Even if there were a conflict between New York and Soviet law, under the conflicts rule laid down by this Court, the New York law must govern.

There is no conflict between any Federal law and the New York State law. In a futile attempt to create such conflict, the Government was forced to take in its brief (p. 40), the absurd position that the Roosevelt-Litvinov agreement is the supreme law of the country within the meaning of the Federal Constitution.

Concededly, the Roosevelt-Litvinov Agreement is a mere executive compact, not concluded with the advice of and not consented to by two-thirds of the United States Senate. It is not a treaty within the meaning of the constitutional provision providing that "all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land" (U. S. Constitution, Art. VI, Cl. 2). What is meant by "authority of the United States" is explained in another part of the Constitution, where it is provided that the President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur" (U. S. Constitution, Art. II, Sec. 2, Cl. 2). A mere executive agreement not advised and consented to by two-thirds of the United States Senate is not a treaty nor the supreme

law of the land within the meaning of the Federal Constitution (*U. S.* v. *Belmont*, 301 U. S. 324, 330; *U. S.* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 318; *Altman & Co.* v. *U. S.*, 224 U. S. 583, 600-1; *Watts* v. *U. S.*, 1 Wash T. 288, 294). Cf. *Sutherland, Constitutional Power and World Affairs*, pp. 120-1, 125, 137-8.

When an international compact made by the United States is not a treaty within the meaning of the Federal Constitution, and is not made for the purpose of effectuating an already existing treaty, advised and consented to by the Senate, then it is not a rule for the courts, unless the Congress by appropriate legislation makes it the law of the land (*Chinese Exclusion Cases*, 130 U. S. 581, 600; *Foster* v. *Neilson*, 2 Pet. 253, 313; *In re Ah Lung*, 18 Fed. 28, 29; *Turner* v. *American Baptist Missionary Union*, 5 McLean 344-7, 24 Fed. Cas. No. 14, 251, pp. 344-5; *In re Metzger*, 17 Fed. Cas. No. 9511, 232-4).

The only possible conflict that may arise in the enforcement of the Roosevelt-Litvinov agreement is that between the Soviet law and the New York law. Under the recent decisions of this Court, the Federal Court must apply such rule for the solution of this conflict as is devised by the State Courts. The rule of the State Court is set forth both in the decision in this case (R. 71-2) and in *Moscow Fire Insurance Co.* v. *Bank of New York & Trust Co.*, 280 N. Y. 286.

In *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U. S. 487, this Court said at pages 496 and 497:

> "We are of the opinion that the prohibition declared in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, against such independent determinations by the Federal courts extends to the field of conflict of laws. The conflict of laws rules to be applied by the federal courts in Delaware must conform to those prevailing in Delaware's state courts. Otherwise the accident of diversity of citizenship would constantly disturb

equal administration of justice in co-ordinate state and federal courts sitting side by side. See *Erie R. Co.* v. *Tompkins*, supra, pages 74-77. Any other ruling would do violence to the principle of uniformity within a state upon which the Tompkins decision is based. Whatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors. It is not for the federal courts to thwart such local policies by enforcing an independent 'general law' of conflict of laws. *Subject only to review by this court on any federal question that may arise, Delaware is free to determine whether a given matter is to be governed by the law of the forum or some other law.* Cf. *Milwaukee County* v. *M. E. White Co.*, 296 U. S. 268. *This courts views are not the decisive factor in determining the applicable conflicts rule.* Cf. *Funkhouser* v. *J. B. Preston Co.*, 290 U. S. 163."

In *Griffin* v. *McCoach*, 313 U. S. 498, this Court said at page 503:

"For the reasons given in *Klaxon* v. *Stentor Electric Mfg. Co.*, 313 U. S. 487, this term, decided today, we are of the view that the federal courts in diversity of citizenship cases are governed by the conflict of laws rules of the courts of the states in which they sit."

Dated: New York, December 1st, 1941.

Respectfully submitted,

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